In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 43.

BRIEF ON BEHALF OF THE UNITED STATES.

MILTON D. PURDY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE C. THOMAS, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 43.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

On the 10th day of December, 1901, the plaintiff in error, George C. Thomas, was indicted by the Federal grand jury in the circuit court for the southern district of New York for violation of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

The indictment charges that George C. Thomas, of the city and county of New York, on the 15th day of May, 1901, being a broker, doing business in said city and county, then and there sold to one T. D. Scoble 100 shares of Atchison preferred stock, for the sum of $9,262.50. And that at the time of said sale the said George C. Thomas made

and delivered a memorandum of said sale to the said Scoble, as follows:

Stamps. NEW YORK, *May 15, 1901.*
Sold to T. D. Scoble, by Geo. C. Thomas,
100 shares of Atchison preferred, at 92⅜ .. $9,262.50

The indictment further charges that it was then and there the duty of said Thomas, under the law, to affix to and upon said memorandum of sale the proper revenue stamps to denote the amount of tax due the Government of the United States at the time of said sale and delivery of said memorandum; and that said Thomas was then and there liable to pay such tax; and that said Thomas at the time of making said sale and the delivery of the memorandum therefor did unlawfully make and deliver the memorandum of sale to the said Scoble without having the proper stamps affixed thereto, with intent to evade the provisions of section 25, Schedule A, of the act of Congress above referred to. (Record, p. 3.)

On the 11th day of December, 1901, the defendant was arraigned, and interposed a demurrer to the indictment upon the ground that the facts alleged in the indictment did not constitute "an infringement of, or a crime against, the laws of the United States," for the reason that the portions of the act of Congress known as the war-revenue act of 1898, upon which the indictment was based, are unconstitutional and void, because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section

2, subdivision 3 thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4 thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." (Record, p. 4.)

On December 24, 1901, argument was had upon the demurrer interposed to the indictment, and on January 28, 1902, Judge Thomas, in a very elaborate opinion, rendered his decision overruling the demurrer. (Record, pp. 5 to 17, inclusive.) The case was tried on the 12th day of March, 1902, before a jury, and a verdict of guilty, as charged in the indictment, was rendered. The court thereupon sentenced the prisoner to pay a fine of $500 and stand committed until the same was paid or until he should be otherwise discharged according to law. (Record, p. 23.) An appeal was thereafter perfected, and the case is here on a writ of error.

QUESTION.

The question raised is the constitutionality of the provisions of the act of June 13, 1898 (30 Stat., 448), known as "the war-revenue act," which levied a tax on all sales, or agreements to sell, or memoranda of sales, or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made

upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents.

CONSTITUTIONAL PROVISIONS.

I.

The provision of the Constitution which gives Congress the power to tax.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, par. 1, Constitution.)

II.

Constitutional exceptions to the power of Congress to lay and collect taxes.

(*a*) Expressed exception:

No tax or duty shall be laid on articles exported from any State. (Art. I, sec. 9, par. 5, Constitution.)

(*b*) Implied exception:

The Constitution necessarily implies an exception to the power of Congress to tax the *means*, *instrumentalities*, and *agencies* of the various State governments.

> The general principle is that as the *means* and *instrumentalities* employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. (*Ambrosini* v. *United States*, 187 U. S., 1, 7.)

The leading cases which hold that the General Government, and the government of the various States, do not have the power to tax the *means* and *instrumentalities* employed by such governments to to carry into operation the powers granted to them, respectively, are:

> *McCulloch* v. *Maryland*, 4 Wheat., 315.
> *Collector* v. *Day*, 11 Wall., 113.
> *Weston* v. *Charleston*, 2 Pet., 449.
> *Bank of Commerce* v. *New York City*, 2 Black., 620.
> *United States* v. *Railroad Company*, 17 Wall., 322–27.
> *Railroad Co.* v. *Peniston*, 18 Wall., 5.
> *Knowlton* v. *Moore*, 178 U. S., 41–59.

III.

The provisions of the Constitution which control Congress as to the manner in which they shall lay taxes, sometimes called "limitations" on the power of Congress to tax.

(a) *Rule of uniformity.*

* * * But all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, par. 1, Constitution.)

(b) *Rule of apportionment.*

First. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. (Art. I, sec. 2, clause 3, Constitution.) (The Fourteenth Amendment modified this provision so that the whole number of persons in each State should be counted, excluding Indians not taxed.)

Second. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Art. I, sec. 9, par. 4, Constitution.)

THE LAW.

The following are the material portions of the act under consideration, the italics being mine:

Adhesive stamps.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock* and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, *the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.* (31 Stats., 940.)

SCHEDULE A.

Stamp taxes.

One. Bonds, debentures, or certificates of indebtedness issued after the first day of July, anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, and on each original issue, whether on

organization or reorganization, of certificates of stock by any such association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, *and on all sales or agreements to sell or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation*, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, *or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock*, or to secure the further payment of money, or for the future transfer of any stock, *on each hundred dollars of face value or fraction thereof, two cents:* Provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of an agreement to sell, or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum or sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers.* And any person or persons liable to pay the tax as

herein provided, *or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock or evidence of the sale of any such stock, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.* (31 Stats., 942.)

REPEAL.

Section 7, of the act of April 12, 1902, entitled "An act to repeal war-revenue taxation, and for other purposes," provides as follows:

SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed. (32 Stats., p. 96.)

ARGUMENT AND AUTHORITIES.

PART I.

PRELIMINARY POINTS APPLICABLE TO FEDERAL TAX LAWS GENERALLY.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

"Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in the *Sinking Fund cases* (99 U. S., 700, 718), "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Powell* v. *Penna.* (127 U. S., 678, 684) the court, speaking by Mr. Justice Harlan, quotes this language with approval, and cites also *Fletcher* v. *Peck* (6 Cranch, 87, 128); *Dartmouth College* v. *Woodward* (4 Wheat., 518, 625); *Livingston* v. *Darlington* (101 U. S., 407); *Ogden* v. *Saunders* (12 Wheat., 213).

In the case of *Nicol* v. *Ames* (173 U. S., 514), Mr. Justice Peckham, in delivering the opinion of the court, said:

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has

frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. *It is not only the power to destroy, but it is also the power to keep alive.*

II.

The Constitution expressly confers upon Congress the taxing power.

The power which Congress exercised in levying the tax now before the court is found in section 8, of Article I, of the Constitution, which reads:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States. * * *

This very comprehensive and almost absolute grant of power to Congress to tax is subject to the following exceptions and limitations.

(1). *Constitutional exceptions.*

(*a*) Expressed. "No tax or duty shall be laid on articles exported from any State." (Art. I, sec. 9, par. 5. *Fairbanks* v. *United States*, 181 U. S., 293.)

(*b*) Implied. "Congress has no power to tax the means and instrumentalities of the governments of the various States of the Union." (*Collector* v. *Day*, 11 Wall.)

(2) *Constitutional limitations upon the manner in which Congress may lay the tax.*

(*a*) *Rule of uniformity.* "* * * but all duties, imposts, and excises shall be uniform throughout the United States." (Art. I, sec. 8, par. 1. *Knowlton* v. *Moore*, 178 U. S., 41–83 et seq.)

(*b*) *Rule of apportionment.*

First. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. (Art. I, sec. 2, clause 3, Constitution.) (The fourteenth amendment modified this provision so that the whole number of persons in each State should be counted, excluding Indians not taxed.)

Second. No capitation or other direct tax shall be laid unless in proportion to the

census or enumeration hereinbefore directed to be taken. (Art. I, sec. 9, par. 4, Constitution.)

Hylton v. *United States*, 3 Dal., 171–177.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.

Pollock v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.

III.

Congress may make all laws which shall be necessary and proper for carrying into execution the foregoing power.

Under the last clause of section 8 of Article I of the Constitution, Congress is given the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. Thus Congress has power to do whatever is necessary, or seems to it necessary, to carry into effect an express power.

In the great case of *McCulloch* v. *Maryland* (4 Wheaton, 316, 421) Mr. Chief Justice Marshall laid down the rule, which has been followed ever since:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all*

means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

IV.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere.

In the case of *McCulloch* v. *Maryland*, already cited, Mr. Chief Justice Marshall said (p. 423):

> *Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.*

This language was quoted with approval by Mr. Justice Gray, speaking for the court in the recent case *Fong Yue Ting* v. *United States* (149 U. S., 698, 712), and also by Mr. Justice Harlan, who delivered the opinion of the court in the later case of the *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 472), with the following additional language (p. 473):

> It is a settled principle of constitutional law that "the Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be

allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (4 Wheat., 316, 409.) The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government. That it may not do with safety to our institutions. (*Sinking fund cases*, 99 U. S., 700, 718.)

V.

With the two exceptions and under the limitations of the Constitution heretofore pointed out, the taxing power of Congress reaches all kinds and descriptions of property and all rights and privileges incident thereto.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice Chase,

speaking for the court, in the *License tax cases* (5 Wall., 462, 471):

> The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And again by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), page 443:

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State tax on foreign-held bonds* (15 Wall., 300, 319):

> The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects

> are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction.

And Mr. Justice White, in the case of *Knowlton* v. *Moore* (178 U. S., 41, 59), has this to say as to this plenary power of Congress to tax.

> *Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership are subject more or less to State regulation, exclusive in its nature.* If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument

when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

VI.

In exercising the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of government.

Within the limits fixed by the Constitution Congress may use its discretion in selecting the subjects of taxation and distributing the burdens of government. The greater part of legislation is special; that is, Congress, in dealing with matters before it, exercises the right of classification. The decisions of this court recognize in the fullest and clearest way the right to classify.

In the recent case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283), where the inheritance-tax law of Illinois was assailed on the ground that there was an arbitrary and unconstitutional classification, Mr. Justice McKenna, speaking for the court, discusses elaborately the decisions upon the subject of classification, reaching the conclusion that the provision of the Illinois law levying a graduated tax upon inheritances, and for that purpose dividing them into classes according to

the value thereof, was not unconstitutional. He concludes with this language (bottom p. 300):

> That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary, because it is determined by that value; it is not unequal in operation, because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned.

As to the power of Congress, through classification, to select subjects of taxation, Mr. Justice Peckham, in the case of *Nicol* v. *Ames* (173 U. S., 509, 521), says:

> The question always is, when a classification is made, whether there is any reasonable ground for it or whether it is only and

simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect.

To the same effect see the following cases:

Gulf Railroad, etc., Ry. v. *Ellis*, 165 U. S., 150.

Barbier v. *Connolly*, 113 U. S., 31.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S., 232, 234.

Home Insurance Co. v. *New York*, 134 U. S., 594.

Pacific Express Company v. *Seibert*, 142 U. S., 339.

Railroad Company v. *Gibbs*, 142 U. S., 386.

Missouri Pacific R. R. Co. v. *Humes*, 115 U. S., 512.

Missouri Ry. Co. v. *Mackey*, 127 U. S., 205.

Kentucky Railroad Tax Cases, 115 U. S., 321.

Missouri v. *Lewis*, 101 U. S., 22, 30.

Horn Silver Mining Co. v. *New York*, 143 U. S., 305.

Munn v. *Illinois*, 94 U. S., 113.

Budd v. *New York*, 143 U. S., 517.

Soonhing v. *Crowley*, 113 U. S., 703.

Wurtz v. *Hoagland*, 114 U. S., 606.

Watson v. *Nevin*, 128 U. S., 578.

Minneapolis v. *Beckwith*, 129 U. S., 26.

C. & N. W. Ry. Co. v. *McLaughlin*, 119 U. S., 566.

Hayes v. *Missouri*, 120 U. S., 68.

Dow v. *Beidelman*, 125 U. S., 680.

VII.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not, it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law, the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that, though the statute called it a license, it was in effect and operation a tax which Congress had the right to levy upon the liquor business.

PART II.

Constitutional provisions which expressly and by necessary implication absolutely exclude articles of export, and the agencies and instrumentalities of the various State governments from the domain of Federal taxation.

The absolute and unlimited power to tax is inherent in every sovereignty. The people of the United States must, therefore, possess this absolute power of taxation without exception or qualification. In adopting the Constitution, however, the people of the United States delegated to the General Government this power to tax *subject to certain exceptions and limitations*. The clause of the Constitution granting this power to the Federal Government is as follows:

> Congress shall have power: To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States. (Art. I, sec. 8, par. 1, Constitution.)

CONSTITUTIONAL LIMITATIONS ON THE PURPOSE OF THE TAX.

It is apparent from this express grant of power to tax that certain limitations or restrictions were imposed upon the *purpose* for which taxes could be laid and collected, and which are as follows:

1. *To pay the debts of the United States;* 2. *To provide for the common defense of the United States;* and, 3. *To provide for the general welfare of the United States.*

Story on Constitution, vol. 1, secs. 907, 926.

7 Jefferson's Works, p. 757.

Tucker on the Constitution, sec. 222.

Judson on Taxation (1903), sec. 480.

These limitations as to the *purpose* for which a tax may be constitutionally laid and collected are so general and far reaching in their nature as to practically amount to *no limitation*.

CONSTITUTIONAL EXCEPTIONS WHICH *EXCLUDE* CERTAIN SUBJECTS FROM THE DOMAIN OF FEDERAL TAXATION.

1. *Express provision:*

No tax or duty shall be laid on articles exported from any State. (Art. I, sec. 9, par. 5, Constitution).

Illustrative case: *Fairbanks* v. *United States* (181 U. S., 283).

This case clearly illustrates how absolute is this express provision of the Constitution in prohibiting Congress from even *indirectly* invading this domain of articles exported from any State, which domain the Constitution says shall be excluded from taxation. Congress is permitted to come to the line, but can go no further. Congress can not, under the decision in this case, even impose a stamp tax on a bill of lading of goods exported from any State.

2. *Implied exception.*

The General Government is prohibited from taxing the means, instrumentalities, and agencies of the governments of the several States.

Illustrative case, *Collector* v. *Day* (11 Wall., 113):

> It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that Government. (*Collector* v. *Day*, *supra*, p. 127.)

See also:

Lane County v. *Oregon*, 7 Wall., 71–77.

Veazie Bank v. *Fenno*, 8 Wall., 533–537.

National Bank v. *Commonwealth*, 9 Wall., 353–362.

United States v. *Railway Company*, 17 Wall., 322–327.

Railway Company v. *Penniston*, 18 Wall., 5–36.

California v. *Central Pacific Ry. Co.*, 127 U. S., 1, 40.

Knowlton v. *Moore*, 178 U. S., 41–59.

(In view of the fact that the Constitution contains certain other limitations having sole and exclusive reference to the exercise of the power of taxation by the several States, and that confusion might easily arise from an attempt to make use of the cases of this court wherein such limitations were

alone considered, as authorities applicable to the case at bar, I have taken the liberty to insert a classification of such limitations, and the cases bearing thereon, in an appendix to this brief, marked "A.")

This law purports to levy a tax upon the sale or transfer of any share or certificate of stock in any corporation, association, or company. It is, therefore, quite apparent that the law in no way comes in conflict with the provision of the Constitution which declares that no tax or duty shall be laid on articles exported from any State.

It therefore becomes necessary to examine this law in connection with this implied prohibition of the Constitution to ascertain, if possible, if the law in effect taxes, either *directly or indirectly*, a means or instrumentality of any State government.

It is true that the law purports to tax *the sale of a certificate of stock* in a corporation. A corporation is an artificial person created and existing under and by virtue of the laws of one of the States of the Union, and by virtue of various State laws pertaining to corporations the stockholders or members of the corporation become clothed with certain rights, privileges, and duties with reference to their property or interest in such corporation. It is therefore apparent that at this point the law under discussion approaches the domain of taxation into which Congress has been forbidden to enter. But, fortunately, we are not compelled to indulge in any speculation as to what

means, instrumentalities, and agencies of a State government are exempt from Federal taxation, and what rights and privileges a State government may confer upon its citizens, subject to the taxing power of the General Government.

One of the first cases wherein this subject received consideration at the hands of this court is that of *Veazie Bank* v. *Fenno* (8 Wall., 533, 547), in which Mr. Chief Justice Chase said:

> Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?
>
> We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.
>
> But in the case before us the object of taxation is not the franchise of the bank, but property created or contracts made and

> issued under the franchise or power to issue bank bills. A railroad company in the exercise of its corporate franchises issues freight receipts, bills of lading, and passenger tickets; and it can not be doubted that the organization of railroads is quite as important to the State as the organization of banks. *But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress and not exempted by any relation to the State which granted the charter of the railroad.* And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them, and both, as we think, may properly be made contributory to the public revenue.

This case clearly illustrates that there are many rights and privileges which may be created by virtue of the laws of the various States, and conferred upon the citizens of such States, which are, nevertheless, proper subjects of taxation by the Federal Government for the reason that such rights and privileges are not necessary agencies or instrumentalities for the legitimate purposes of State government.

This case was very shortly followed by the decision of the case of *Collector* v. *Day* (11 Wall., 113), wherein it was clearly pointed out precisely what means and instrumentalities of a State government Congress is forbidden to tax under this implied

power in the Constitution. In that case the court said (p. 126):

> We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that Government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins* v. *The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the

States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno* (8 Wall., 533), in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCullock* v. *Maryland*, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the Government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the General Government, just as the judicial office in the present case might

> be, if subject at all to taxation by that Government. But notwithstanding the sanction of this taxation by a majority of the court, it is conceded in the opinion that "the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain. (*Collector* v. *Day*, 11 Wall., 113, 126.)

From a consideration of these two cases we see very clearly that the line of demarcation has been sharply drawn between the rights and privileges which a State may create and confer upon its citizens for their peculiar and special benefit, but which are, nevertheless, subject to Federal taxation, and those governmental agencies and instrumentalities which must of necessity be free from Federal control or influence in order to give effect to State laws through proper executive action.

Without attempting to follow the various decisions of this court rendered since the decision of the two cases above reviewed, and which have contributed, more or less, to make the line of separation more clear and well defined, it is apparent that the law with which we are at present concerned, and which professes to affect only indirectly

the shares of stock in a private corporation, has not invaded or attempted to invade the forbidden realm of taxation which has been so zealously and carefully guarded by the decisions of this court.

We will therefore conclude this discussion by quoting the language of Mr. Justice White in delivering the opinion of the court in the case of *Knowlton* v. *Moore* (178 U. S., 41–59):

> In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct, and many acknowledged objects of indirect, taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State can not be taxed because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the

several States because Congress may regulate interstate commerce? *Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership are subject more or less to State regulation, exclusive in its nature.* If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

PART III.

Constitutional limitations upon the manner in which the Congress may impose any particular tax.

Having already demónstrated that the provision of the war revenue act of 1898 here under consideration is not violative of either of the prohibitory clauses of the Constitution, the one express and the other implied, heretofore considered, it necessarily follows that the Constitutional power of Congress to impose the tax is no longer open to question. There remains, however, a further subject of inquiry, which is as to the *manner* in which Congress is required by the Constitution to lay every tax which even it has the undoubted right to impose.

We have seen that with the exception of exports, and the means and instrumentalities of the various States, that the Constitutional power of Congress to tax is practically absolute. But overspreading this vast and almost absolute realm of taxation, wherein the taxing power of Congress reaches all persons, property, and privileges of whatever description, including the various relations, rights, and incidents of the individual citizen with respect to property, we find imposed two very important Constitutional limitations upon Congress which control and regulate its action as to the manner in which it may exercise this great power.

CONSTITUTIONAL LIMITATIONS UPON THE MANNER IN WHICH CONGRESS MAY EXERCISE THE TAXING POWER.

1. *Rule of apportionment.*

(*a*) Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. * * * (Art. 1, sec. 1, par. 3, Constitution.)

(*b*) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Art. 1, sec. 9, par. 4, Constitution.)

2. *Rule of uniformity.*

* * * but all duties, imposts, and excises shall be uniform throughout the United States. (Art. 1, sec. 8, par. 1, Constitution.)

Whatever may be the precise meaning of the phrase "direct tax" as understood and used by various writers on the subject of political economy, it is only necessary to an intelligent discussion of the validity of the law under consideration to ascertain and determine what is understood by the phrase "direct tax" *within the meaning of the Constitution*.

As Mr. Justice Peckham said, in delivering the opinion of the court in the case of *Nicol* v. *Ames* (173 U. S., 509, 515):

> The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.
>
> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scien-

tific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

DIRECT TAXES.

The following are the only direct taxes, within the meaning of the Constitution, which have been decided to be such by the opinions of this court:

(1789-1896.)

1. A capitation or poll tax.

The Constitution in express terms regards a capitation or poll tax as a direct tax.

> No *capitation* or other direct tax shall be laid, etc. (Art. 1, sec. 9, par. 4, Constitution.)

2. A tax on lands (that is, a *direct* tax on lands such as is ordinarily imposed).

Hylton v. *United States*, 3 Dallas, 171.
Pacific Insurance Co. v. *Soule*, 7 Wall., 433.
Veazie Bank v. *Fenno*, 8 Wall., 533.
National Bank v. *United States*, 101 U. S., 1.
Scholey v. *Rew*, 23 Wall., 331.
Railroad Company v. *Collector*, 100 U. S., 595.
Springer v. *United States*, 102 U. S., 586.

(1896 TO THE PRESENT DATE.)

3. A tax upon all one's personal estate by reason of one's general ownership thereof. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

4. A tax on the income of real property. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.)

5. A tax upon the income of personal property. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

TRUE SCOPE OF THE SECOND INCOME-TAX CASE.

We maintain that the true scope of the second income-tax case, in so far as it holds that a tax on personal property is a direct tax within the meaning of the Constitution, refers simply to a tax imposed upon *all one's personal estate solely* because of *one's general ownership of* such personal property, and that this is apparent, not only from the decision itself, but from subsequent decisions

of this court wherein the real meaning of that case in this particular was adverted to and made clear.

(*a*) *From the case itself.*

Mr. Chief Justice Fuller, in delivering the opinion of the court, on page 625, quoted the following from the writings of Alexander Hamilton:

> The following are presumed to be the only direct taxes, capitation, or poll taxes: Taxes on lands and buildings; general assessments whether on the whole property of individuals or on their whole real or personal estate. All else must of necessity be considered as indirect taxes.

In commenting upon the above definition of direct taxes, the Chief Justice says:

> He gives, however, it appears to us, a a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax in the meaning of the Constitution.

And again, page 628, he says:

> Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The

> Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax can not be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed."
>
> Personal property of *some kind* is of *general distribution*, and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

And, in conclusion, on page 637, the Chief Justice clearly pointed out that *all* of one's personal estate was the question which the court considered, and upon which its conclusion was based, that a tax on personal property is a direct tax. He says:

> We do not mean to say that an act laying by apportionment a direct tax on *all real estate and personal property*, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations.

(*b*) *From the subsequent decisions of this court.*

In the case of *Knowlton* v. *Moore* (178 U. S., 41, 82) Mr. Justice White, in delivering the opinion of the court, had the following to say with reference to the true meaning of the income-tax cases:

It is true that in the income-tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. *The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person *solely because of his general ownership of real property* and the same tax imposed *solely because of his general ownership of personal property;* secondly, that the tax on the income derived from *such property*, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises which are not the essential equivalent of a tax on *property generally, real or personal, solely because of its ownership*, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

I think that no one would contend that the law now under consideration imposing a tax upon the sale or transfer of a certificate of stock falls within the meaning of a *capitation tax* or a *tax upon real estate;* nor would anyone contend that this law in any manner seeks to impose a tax upon an *income from real estate* or upon an *income from personal property*. There remains, therefore, but one class of taxation to be considered which has been adjudged by this court to be a direct tax, namely, *a tax levied upon one's personal property generally on account of one's general ownership thereof*. Can it be maintained that this law comes within that classification? The law here under discussion imposes a tax upon the sale or transfer of a certificate or share of stock of any corporation. Such a tax is clearly distinguishable from a tax imposed upon personal property on account of one's *general ownership*, as defined in the income tax cases.

Admitting, however, arguendo, as assumed by counsel for the plaintiff in error, that a law imposing a tax upon a sale or agreement to sell a certificate of stock *is a tax upon personal property*, the income tax cases are certainly no authority for asserting that such a tax must be regarded as *a direct tax* upon personal property within the meaning of the Constitution. A tax upon a certificate of stock in a corporation, even though directly imposed upon such certificate instead of being imposed upon the incident of sale, requires no argument to demonstrate that it is not a tax

upon *all* one's personal estate levied *solely* on account of one's *general ownership* thereof. The income tax cases, therefore, have no application to the case at bar. A tax, even if imposed directly on a certificate or share of stock, would manifestly affect specific or particular kinds of personal property, and, as an inevitable result, would be subject to the difficulty, if not the impossibility, attending its apportionment. Such difficulty, as was clearly pointed out in the income tax cases, is in a great measure avoided when all the personal estate is the object or thing taxed, for personal property of some kind is of general distribution throughout the country similarly if not equally with lands.

(For various definitions of the word taxes and the popular theory of taxation in the United States, see Appendix B.)

PART IV.

We have thus far shown that a tax imposed upon the sale of a certificate of stock does not fall within any of those domains of taxation excluded from the operation of the taxing power of Congress by express provision of the Constitution, and the necessary implication contained in that instrument; we have likewise demonstrated that such a tax does not fall within any of the five classes of direct taxation which have, up to the present time, been adjudged by this court, to be subjects of direct taxation within the meaning of that instrument.

Let us consider, then, whether this law presents a new and heretofore undiscovered species of taxation which, when critically examined, must be regarded as a direct tax within the meaning of the Constitution, or whether the tax imposed by this law is an indirect tax, or a tax in the nature of a duty or excise.

That the law under discussion imposes a tax there can be no doubt, and as all taxes are either direct or indirect, if it be established that the tax here imposed is not a direct tax, it necessarily follows that it must be an indirect tax. And, inasmuch as all duties, imposts, and excises are indirect taxes, it is manifestly immaterial whether this tax be determined to be an indirect tax or a tax in the nature of a duty or excise. As to whether it must be determined to be *a tax* in the nature of *a duty or excise* in order to be considered *an indirect tax* is a question concerning which there may be some doubt.

In the case of *Hylton* v. *United States*, Mr. Justice Chase intimated that there may be a species of taxes other than direct, and at the same time not included within the words "duties, imposts, and excises." He says:

> If there are any other species of taxes that are not direct and not included within the words "duties, imposts, or excises," they may be laid by the rule of uniformity or not, as Congress shall think proper and reasonable. If the framers of the Constitution

> did not contemplate other taxes than direct taxes and duties, imposts, and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary.

But Mr. Chief Justice Fuller, in delivering the opinion of the court in the *First Income Tax Case* (157 U. S., 557), very strongly intimated that in order that a particular tax may be regarded as an indirect tax it must be included within the words duties, imposts, and excises. He said:

> And although there have been from time to time intimations that there might be some tax which was not a direct tax, nor included under the words duties, imposts, and excises, such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

And while, in view of this language, it may be necessary for the Government to show that the tax here imposed is a tax in the nature of a duty or excise, our contention is that the meaning of these words have been gradually enlarged by judicial interpretation so as to include every tax which is indirect in its character. It is, therefore, immaterial in the discussion of this case whether the tax upon the sale of a certificate of stock be regarded as an indirect tax, pure and simple, or

whether it be included under the words duties, imposts, and excises. We will, therefore, endeavor to point out several reasons for holding the tax here under discussion to be *an indirect tax*, or *a tax in the nature of a duty or excise* within the meaning of the Constitution.

(See Appendix "C" for various definitions of the terms "duties" and "excises" and the gradual enlargement of their meaning.)

VARIOUS THEORIES UPON WHICH THE LAW MAY BE SUSTAINED AS IMPOSING AN INDIRECT TAX, OR A TAX IN THE NATURE OF A DUTY OR EXCISE.

A.

The tax here imposed is an indirect tax within every difinition of that term contained in the many decisions of this court, and the writings of leading authors on the subject of political economy.

1. Accepted definitions of direct and indirect taxes, as shown by the opinions of this court.

In *Knowlton* v. *Moore* (178 U. S., 47), Mr. Justice White adopted the following definition:

> Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.

Mr. Chief Justice Fuller, in the first income-tax case, says (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered

> indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized.

Mr. Chief Justice Chase, in *Veazie Bank* v. *Fenno* (8 Wall., 546), gives the following definition:

> And it may further be taken as established, on the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

(See Appendix "D" for further definitions of direct and indirect taxes, which have received the approval of this court.)

Definition of direct and indirect taxes by Dr. David A. Wells, in his "Theory and Practice of Taxation," page 341:

> In a general sense the term *direct* is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them, and *indirect* to those which are demanded from a person with the expectation and intention

that he shall indemnify himself for payment of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense of ultimately) by the consumer of the taxed article. On the other hand, *a direct tax has always in it an element of compulsion*—not necessarily on the person who advances the tax in block, but on the person who is compelled to use or consume the taxed property or its product.

(For definitions of other writers on political economy see Appendix D.)

Tested by these definitions, it is very clear that the tax imposed by this law is indirect in its nature. A tax upon the sale of a certificate of stock can not be said to bear immediately upon the persons or parties to such transaction, nor upon the possession and enjoyment of their rights. The owner of the stock is entitled to the possession thereof for all time absolutely free from the operation of this law. He likewise enjoys all the rights incident to the ownership of such property free from any tax. It is only upon the happening of an event or an exchange, to wit, the sale of the certificate of stock, that the tax attaches, and in such event the law simply imposes a tax upon the sale or agreement to sell, and either the seller or the

buyer may pay the tax wholly or in part, and the property, to wit, the certificate of stock, passes unaffected. Consider the facts in this very case in which the tax was not paid by the plaintiff in error, George C. Thomas. Is there any question but that the 100 shares of Atchison preferred stock passed from George C. Thomas to T. D. Scobel at the city of New York on the 15th day of May, 1901, unaffected by this law? It is true that the plaintiff in error made himself liable to indictment and punishment for failing to obey the requirement of the law. Nevertheless, the property, to wit, the shares of stock, passed unaffected by the law, according to the terms of the sale, from the plaintiff in error to the party to whom they were sold.

From this one circumstance it is apparent that there is a sound distinction between a tax of this character and the direct tax which we have heretofore considered. A capitation tax is levied upon a person, and if not paid the individual is ordinarily required to perform certain services for the State in lieu thereof. A direct tax on lands, if not paid, operates as a lien upon the thing taxed, and the particular real estate is taken possession of by the Government and sold to satisfy the tax. A direct tax upon personal property, such as the States ordinarily levy, likewise operates as a lien upon the particular property which is the object of the tax, and I presume that a tax upon the income from real estate, or all of one's personal estate, would operate in the same manner.

And, again, this tax has distinguishing characteristics of an indirect tax in that it is paid voluntarily. There is no element of compulsion present. The owner of the certificate of stock may hold his property and enjoy the fruits and benefits arising therefrom uninterruptedly for all time, and it is only when he elects to take advantage of the privilege afforded to him under the laws of his State, to wit, the sale or disposition of the share of stock, that he becomes liable for the tax. It is difficult to see where there is any element of compulsion in reference to a matter which a person may do or not do of his own free will. There is compulsion in a capitation tax, for the citizen can not escape it while he is living in the country. He can not escape a tax upon his lands, nor a tax upon his whole personal estate. Upon this question Dr. Wells has the following to say in his work on the Theory and Practice of Taxation (p. 342):

> A tax on commodities like whisky, tobacco, fermented liquors, oleomargarine, playing cards, dice, and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon *all* real or personal property, or on the income of such property. Human beings can not subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason

of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes.

So in the case here under discussion, the owner of the certificate of stock may pay the tax or not just as he chooses, or he may require the purchaser to pay the tax, or the amount of the tax may be borne partially by each of the parties to the transaction, and the voluntary element is present in the law in any sense in which you may view its practical operation.

B.

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several States according to population.

(1) Every reason advanced by the justices of this court who dissented in the income-tax cases, on the ground that an income tax could not be apportioned among the several States, applies with equal or greater force to the apportionment of a tax levied upon the sales of certificates of stock.

(2) The opinion of the majority of the court in income tax cases distinctly recognized that a tax levied upon specific personal property, which might not be the subject of general distribution throughout the United States, but only of partial distribution, as, for example, cotton, tobacco, rice, etc., would be incapable of apportionment, and

must for that reason be held to be in the nature of a duty or excise, and therefore not direct taxation within the meaning of the Constitution. But they held that *all personal property*, being the subject of *general distribution* throughout the States, perhaps to the same extent as lands, that it was impossible to draw any distinction between a tax on lands and a tax on all of one's personal estate. And that, furthermore, there could exist inherently no greater difficulty in apportioning a tax on personal property generally than in apportioning a tax on lands.

(3) If it be impossible to apportion a tax on carriages, tobacco, cotton, rice, or whisky, and various other specific kinds of personal property for the reason that such subjects may not be articles of general distribution throughout the United States, would not the same difficulty apply to shares or certificates of stock which have been held to be personal property? It is only necessary to state that shares of stock in a corporation, especially in view of the fact that the situs of such property can be so easily changed, can not be claimed to be of *general distribution* throughout the United States, to the same extent, at least, in which real and all personal property is generally distributed.

(4) The difficulty of apportionment of a tax upon the sales of certificates of stock is apparent from the facility with which the situs of such property may be changed. The suggestion of Mr. Justice White, in his dissenting opinion in the second

51

income tax case (p. 713), applies with even greater force to the law here under discussion. He says:

> The application of the rule of apportionment by population to invested personal wealth would not only work out this wrong but would ultimately prove a self-destructive process, from the facility with which such property changes its situs. If so taxed, all property of this character would soon be transferred to the States where the sum of accumulated wealth was greatest in proportion to population, and where, therefore, the burden of taxation would be lightest, and thus the mighty wrong resulting from the very nature of the extension of the rule would be aggravated.

So, in the case at bar, if it were held that notwithstanding the power of Congress to tax the sale of a certificate of stock, such tax must be laid by the rule of apportionment, the result could be better imagined than described. The sales of all certificates of stock, by reason of the facility with which the situs of such transactions could be changed, would soon be transferred to the States where the total sums of sales of certificates of stock was greatest in proportion to population, and where, therefore, the burden of taxation would be the lightest, and thus not only would a mighty wrong result, but many States might have no sales consummated in their borders, and would thus be unable to pay any portion of the tax so apportioned to them in accordance with their population.

C.

The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.

It can not be doubted that Congress has the power to declare that any person who shall engage in the business or occupation of buying and selling certificates of stock shall pay a tax measured by the price realized.

TAXES ON OCCUPATIONS, BUSINESS, AND PRIVILEGES.

The power to impose privilege and occupation taxes exists independently and concurrently in the State and Federal governments, subject to the constitutional restrictions; in the State governments subject to the exclusive rights conferred on Congress to regulate interstate commerce, and in the Federal Government subject to the prohibition of any interference with the internal regulations of the State.

Ward v. *Maryland*, 12 Wall., 418.
License Tax cases, 5 How., 504.
Nathan v. *Louisiana*, 8 How., 73.
Dobbins v. *Erie County*, 16 Peters, 435.
Ward v. *Maryland* (12 Wall., 418).

This was a case in which a statute of the State of Maryland required all traders, resident in the State to take out a license, and pay therefor certain sums, regulated by a sliding scale from $15 to

$150, according as the stock in trade might vary from $1,000 to $40,000. The tax was declared to impose a discriminating tax upon nonresident traders trading within the limits mentioned, and that it was a regulation of commerce between the States and repugnant to the Federal Constitution and void for the reason that it made it a penal offense for any person not a resident of the State to sell, or offer for sale, within certain limits of the State, goods, wares, and merchandise other than agricultural products and articles manufactured in Maryland. The court, however, in delivering the opinion, through Mr. Justice Clifford, said (p. 427):

> Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. Both are subject, however, to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other.

Mr. Chief Justice Chase, in the case of *Veazie Bank* v. *Fenno* (8 Wall., 533, 544), says:

> This review shows that personal property, contracts, occupations, and the like have ever been regarded by Congress as proper subjects of direct tax.

Mr. Chief Justice Fuller, in *Farmers' Loan and Trust Company* v. *Pollock* (157 U. S., 429), says:

> We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, and the income thereof, may not also lay excise taxes on business, privileges, employments, and vocations.

See also *Railway Company* v. *Collector* (100 U. S., 593, 598).

(D.)

The law may also be defended on the theory that the tax imposed is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification.

Shortly after the formation and adoption of the Constitution a system of laying stamp duties upon contracts as such was inaugurated, and we find provisions to that effect running through the various acts of Congress from as early as 1794 down to and including the war-revenue act of June 13, 1898.

> By chapter 11, of the act of July 6, 1797, a stamp duty was placed on "bonds, bills, * * * foreign or inland bills of exchange, promissory notes, or other note for the security of money, * * * any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State, or other bank," (section 1). Chapter 53, of the act of August 2, 1813, similarly laid

a tax on any bond, obligation or promissory note or notes not issued by any bank, companies, or banker, as aforesaid, discounted by any such bank, company, or banker, and on any foreign or inland bill or bills of exchange, above $50, and having one or more indorsers. Chapter 119, of the act of 1862 (12 Stat. at Large, 479), laid a tax upon bank checks, inland bills of exchange, drafts or orders for the payment of money, certificates of stock in any incorporated company, certificates of deposit, brokers' note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description issued by brokers or persons acting as such, also any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction;" also, any "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof;" also, any "mortgage of lands, estate, or property, real or personal, heritable or movable whatsoever, where the same shall be made a security for the payment of any definite and certain sum of money, * * * ; also any conveyance of any lands, estate, or property, whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security," etc.

In the case of *Veazie Bank* v. *Fenno*, Mr. Chief Justice Chase has the following to say as to the power of Congress to tax contracts:

> A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets, and it can not be doubted that the organization of railroads is quite as important to the State as the organization of banks. *But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad.*

And to the same effect is the language used by Mr. Justice White in the case of *Knowlton* v. *Moore* (178 U. S., 41, 59), wherein the power of Congress to tax contracts in the form of stamp duties was distinctly and positively recognized.

> Conveyances, mortgages, leases, pledges, and indeed all property, and the contracts which arise from its ownership, are subject, more or less, to State regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those

> powers of taxation which, from the foundation of the Government, admittedly have belonged to them.

And, finally, in the case of *Treat* v. *White* (181 U. S., 264, 268), Mr. Justice Brewer, in delivering the opinion of the court, after saying that the question before the court was simply one of statutory construction, says:

> That no stamp duty was imposed on agreements to buy (or, in the vernacular of the stock exchange, "puts") furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

(E.)

The tax here imposed may be sustained on the ground of its close analogy to the tax involved in the case of Hylton v. United States. (3 Dallas, 171.)

In the Hylton case a tax upon carriages was held to be an indirect tax in the nature of a duty or excise levied upon the use of the carriage. How much more indirect would be a tax levied upon the sale of carriages? The use of a carriage is a constant, continuing, and ever-present right which the owner

must continually exercise if he is to enjoy the benefits arising from the ownership, but the sale of the carriage is only an incidental or contingent right which the owner may never take advantage of, while in the meantime he continues in the fullest enjoyment of his property free from taxation. It is only in the event of a sale, which is, of course, purely voluntary upon his part, that the tax attaches, and even then it may be shifted in whole or in part upon the purchaser. On the authority of this case, and the succeeding cases to and including the Springer case, which, as we have seen, are not in conflict with the income tax cases wherein all one's personal property was contemplated, may not Congress lawfully impose a tax upon a certificate of stock directly by the rule of uniformity? Such a tax would evidently rest upon the specific kind of personal property. It is immaterial that the share or certificate of stock may stand for and represent divers kinds, of both real and personal property, for the law regards the certificate of stock as personal property, and it would seem to be immaterial what such certificate represents in its final analysis; but however that may be, it is quite clear that a tax upon the sale of such property is even more remote and incidental than a tax upon carriages, and would be similar to a tax imposed upon the sale of carriages.

F.

The tax here imposed may be sustained upon the theory that it is laid upon the privilege or facility afforded the owner of the stock, under and by virtue of the laws of the State authorizing the formation of the corporation, to sell and dispose of his property in the form of a certificate of stock.

It is the certificate of stock which is the evidence of the holder's title to the shares in the property and franchises of the corporation. The sale of the certificate is a transfer of such shares to another person. The State furnishes facilities whereby persons may form a corporation, which may designate the individual interests of its members by certificates transferable upon its books, so as to permit the holders to manage or direct the business of the corporation with such liability, privileges, and immunities as the charter and the law provide. Congress has declared that every person who holds such a certificate in such artificial body, and shall transfer by sale to another person the right to participate in such corporation, and to become a member thereof with the accompanying property rights and benefits, shall pay a tax on the contract or transaction whereby the transmission is effected. The State gives the privileges of the corporation to the stockholders, and if the Government may tax privileges why may it not tax this particular privilege. Membership in a corporation created by a State is an artificial privilege similar if not equal in degree to that in an incorporated exchange,

and the benefits of incorporation if taxable in one case on principle should be taxable in the other.

In the case of *Nicol* v. *Ames* (173 U. S., 521), in construing a very similar provision of the war-revenue act of 1898, Mr. Justice Peckham, in the course of the opinion, said:

> A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded.

If the above language of Mr. Justice Peckham be applied to all the facts under consideration in the case at bar it would read substantially as follows: A tax upon the privilege of selling property held in the form of a certificate of stock, and thus using the many advantages and facilities afforded the certificate holder in accomplishing the sale differs radically from a tax upon every sale of property, the title to which is not evidenced by a certificate of stock. The latter tax is really and practically but not directly upon the property within the meaning of the Constitution; it takes no notice of the kind of property, or rather the form in which the property is held and sold; the fact of the sale alone is regarded.

Congress has the power to tax franchises or privileges, although it may not have the power to

create them, providing always that such franchises or privileges are not agencies or instrumentalities made use of by the States as legitimate and necessary means of government.

A mere superficial examination of the law under discussion would justify the assertion that the tax imposed by this law rests upon the sale, or contract of sale, of shares or certificates of stock in a corporation. And were it not for certain decisions of this court, wherein a similar provision of this same law has received consideration, we would be inclined to take the position that the *real object* of the tax is the *contract of sale*, and that the mere fact that the law is limited in its application to property held in the form of a certificate of stock is important only in so far as it furnishes a basis of classification. In other words, that Congress, in the exercise of its undoubted powers of taxation, very properly recognized that there is a marked distinction between the sales of property represented by certificates or shares of stock and the sales of all other property not thus represented.

In the case of *Nicol* v. *Ames* (*supra*), the law under consideration provided as follows:

> Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value or fractional part thereof in excess of one hundred dollars, one cent.

If the language of that law be followed and construed literally, it is apparent to the casual reader that the object upon which the tax is imposed by that law is *the sale or contract of sale*. It is true, however, that the law does not impose a tax upon every contract of sale, but only *contracts to sell products or merchandise*. This is the first limitation that we find the law imposes, and which limits the contract to only *such contracts as deal with sales of products or merchandise*. But upon reading further we find the second limitation, which still further narrows the scope of the operation of the law to contracts for the sale of products or merchandise *at an exchange or board of trade*. From a consideration of these two limitations upon the character of the sale, which is the object of the tax named in the law, one would naturally assume that these limitations were material only so far as they afforded a basis of classification—that is, that they limited and confined the operation of the tax within narrower limits, and to only such sales or contracts of sale as had to do with products or merchandise when effected and consummated at an exchange or board of trade. This court, however, did not stop at any such superficial examination of the law, but analyzed the law very critically for the purpose of determining the real object upon which the tax was imposed. In delivering the opinion of the court in that case Mr. Justice Peckham says:

> We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and can not on that ground be found to be direct.

And further:

> In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of

> the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment.

An examination of this case, therefore, shows that the court, after a critical examination and analysis of the law, arrived at the conclusion that the tax imposed was not levied (primarily at least) upon the sale or agreement to sell, nor upon the parties to the contract on account of their membership in the association, nor upon the product or merchandise which was the subject-matter of the transaction, *but upon the facility or means which was afforded to members of such association to sell their products and merchandise at a particular place where they were afforded extraordinary and unusual privileges for the purposes of effecting the sale of merchandise.*

If, therefore, we subject the law under discussion to the same critical analysis that was applied to a similar provision of the war-revenue act of 1898 in the case of *Nicol* v. *Ames*, we may, with propriety, claim that the tax here imposed rests *ultimately upon the privilege* which every citizen enjoys *to dispose* of his property *in the form of a certificate of stock*, and that Congress, in imposing this tax, did not have in mind *the contract* or *business* of the parties to the contract, nor the *privilege* enjoyed by the stockholder in being permitted *to*

hold his property in *corporate form*, but the *right* or *privilege* which he enjoyed as a stockholder of a corporation *to dispose of his property in the form of a certificate of stock* with all the incidental benefits arising therefrom.

(G.)

A tax similar to the tax here under discussion has been uniformly regarded by the legislative and executive departments of the Government since its foundation as an indirect tax within the meaning of the Constitution.

(1) Tax on certain certificates of stock (1797):

By the act of July 6, 1797 (1 Stats., 527, 528), entitled: "An act laying duties on stamped vellum, parchment, and paper" a tax was levied upon—

> any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State or other bank, above twenty dollars and not exceeding one hundred dollars, ten cents; above one hundred dollars, twenty-five cents.

(2) Tax on certificate of stock (1862):

By the act of July 1, 1862 (12 Stats., 432, 481), entitled, "An act to provide internal revenue to support the Government, and to pay interest on the public debt," a tax was laid upon—

> A certificate of stock in any incorporated company, twenty-five cents.

And again—

> Upon a broker's note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description, issued by brokers or persons acting as such, ten cents.

(3) Tax on the sale or agreement to sell a certificate of stock (1898):

The act of June 13, 1898 (30 Stats., 448), imposing the tax here under consideration.

Reference is made to these various laws for the purpose of demonstrating that if any doubt arises as to the exact nature of this tax, resort may be had to the practical construction of similar laws by the legislative and executive departments of the Government.

Mr. Justice Brewer, in delivering the opinion of the court in *Fairbank* v. *United States* (181 U. S., 283, 311), says:

> From this *résumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but

where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

Our contention is that there can be no doubt but that the tax here under consideration is an indirect tax within the meaning of the Constitution, but if there be any doubt upon that proposition this court should yield assent to the construction placed upon the law by those having actual charge of the execution of the statute, and the views of Congress as to the nature of the tax when enacting the law.

(H.)

And finally, it is contended that an act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. A fortiori, is a law constitutional which merely taxes the sale, or agreement to sell, such property.

Let us suppose, for the purposes of the argument, that we have a law of Congress imposing a tax directly upon a certificate of stock in any corporation or association. Such a law would be similar, if not identical, to the act of Congress imposing a tax upon carriages, for while the law imposing a tax upon carriages had reference solely to certain particular and specific personal property, a law imposing a tax directly upon certificates of stock

would likewise have reference to only certain particular and specific personal property of the citizen. It is true a certificate of stock might represent divers and various kinds of both real and personal property; nevertheless a law taxing a certificate of stock, which has been held to be a species of personal property, would not fall within the definition or rule announced in the Pollock cases.

While such certificate of stock might represent all of the estate, both real and personal, of the owner, yet it would not do so necessarily and at all events. It might with the same reason be contended that a tax upon carriages in certain isolated and particular instances, where all the citizen's estate is invested in carriages, would operate as a tax upon his entire estate, yet the law would not have such effect necessarily; and it is clear that it was not the intention of the law-making power in enacting the law under discussion in the Hylton case, or in passing the law under discussion in the case which I have supposed, where the tax operates directly upon the certificate of stock, that the law should operate upon all the personal estate of the individual citizen.

In the Hylton case the tax was imposed directly upon carriages, and yet it was held to be an indirect tax in the nature of a duty or excise upon the use of the articles upon which the tax was directly imposed.

In *Pacific Insurance Company* v. *Soule* (7 Wall., 433), the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was a duty or excise, and came within the decision in the Hylton case.

In *Veazie Bank* v. *Fenno* (8 Wall., 533, 544, 546), a tax was laid on the circulation of State banks, or national banks paying out notes, or individual State banks, and it was held that the law should be classed under the head of duties, and as falling in the same category as Soule's case (7 Wall., 434).

The same effect, *National Bank* v. *United States* (101 U. S., 1); *Scholey* v. *Rew* (23 Wall., 333); *Railroad Company* v. *Collector* (100 U. S., 595); *Springer* v. *United States* (102 U. S., 586, 602.)

In the case of *Patten* v. *Brady* (184 U. S., 608), a provision of the war revenue act of June 13, 1898, imposing a tax of 12 cents per pound directly "upon all tobacco and snuff, however prepared, manufactured, and sold, for consumption and sale," was under consideration.

Mr. Justice Brewer, in delivering the opinion of the court, held the law constitutional as imposing an indirect tax. He said:

> It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax * * * within the rule laid down in the income-tax cases, but, as we have seen, it is not a tax upon property as such, but

upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities," an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy, and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this act is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

So the tax here under consideration if it be considered as levied upon the certificates of stock themselves "is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use."

Is a taxed levied upon a certificate of stock so inherently different from the various tax laws laying a tax upon certain specific kinds of personal property as to remove it from the operation and sanction of those cases? And, on the other hand, can a law laying a tax directly upon a certificate of stock in a corporation be said to be essentially the same as a tax laid upon all one's personal estate, and thereby coming within the decision of this court in the income-tax cases? We answer both questions in the negative.

If it be important to determine the precise and ultimate object upon which this tax is imposed, we are inclined to take the position that primarily the tax rests upon the privilege which is afforded to the individual citizen to dispose of his property in the form of a certificate or share of stock in a corporation.

The law, as applied to the facts in this particular case, expressly designates the sale or agreement to sell a certificate of stock as the object or thing taxed, but in its last analysis the law imposes the tax upon the privilege which is afforded to the individual citizen to dispose of his property in the form of a certificate or share of stock, which he is permitted to hold and own in such form under the laws of the various States authorizing the creations of corporations and associations. It is not every sale, or agreement to sell property that is taxed, but only such sales and agreements to sell as pertain to certificates or shares of stock. We are, therefore, compelled to accept the final and determining element imposing a limitation upon the sale or agreement to sell as the real object of the tax, and the one which Congress must have had in mind when enacting the law.

VI.

A review and discussion of the cases relied upon by counsel for plaintiff in error, for the purpose of showing their misapplication to the case at bar, and the fallacy contained in the conclusion deduced therefrom.

In the case of *Brown* v. *Maryland* (12 Wheaton, 444):

> The legislature of the State of Maryland passed an act requiring all importers of foreign articles or commodities to take out a license as an authority to sell, for which they were required to pay a fee of $50. The payment of this license fee was resisted upon ground that the act under consideration was in violation of the clause of the Constitution of the United States prohibiting any State from laying any imposts or duties on imports or exports without the consent of Congress.

It will be observed that under this provision of the Constitution the various States were absolutely prohibited from laying any imposts or duties on imports or exports without the consent of Congress; consequently the State of Maryland did not have the power to impose any tax, either direct or indirect, and the court very properly decided that a tax on the sale of an article exported only for sale is a tax on the article itself.

But that case did not decide that such a tax was a direct tax. It was not necessary for the court to say whether it was direct or indirect, for, inasmuch as the legislature did not have any power to impose

any tax, direct or indirect, it made no difference whether the tax was imposed upon the article itself or upon the sale of the article imported; in either event such a tax was in violation of the Constitution prohibiting any State from laying imposts or duties on the imports and exports without the consent of Congess. And again in the case of *Welton* v. *Missouri* (91 U. S., 279):

> The legislature of the State of Missouri passed an act requiring peddlers of foreign-made goods to pay a license tax. The law was declared unconstitutional upon the ground that it was a tax upon foreign commerce and in contravention of the exclusive power of Congress to regulate commerce with foreign countries and between the States.

It will be observed that in that case the State legislature attempted to indirectly regulate commerce between the States, and inasmuch as the State did not have any power over the subject-matter it was held that it could not do that indirectly which it could not do directly.

So in the case of *Cook* v. *Pennsylvania* (97 U. S., 573):

> The legislature of the State of Pennsylvania passed an act requiring auctioneers to pay to the treasury of the State a tax on all sales made by them of foreign or imported goods. The law was declared invalid upon the ground that the tax on sales made by

an auctioneer was a tax on the goods sold and was unconstitutional because in contravention of the prohibition of a State tax on imports.

Here again, as in *Brown* v. *Maryland* (*supra*), the legislature of Pennsylvania was assuming to tax indirectly that which it had not the power to do, either directly or indirectly. There was an absence of power to lay any tax upon imports without the consent of Congress. And while the court said that "the tax on sales made by an auctioneer is a tax on the goods sold," it did not say, nor was it necessary nor proper that it should say, that such a tax was a *direct tax*. It did not make any difference whether it were *direct* or *indirect*, the State of Pennsylvania did not have the power or authority to impose any tax whatsoever in such a case.

And again in *Fairbanks* v. *United States* (181 U. S., 294). In that case Congress itself attempted to lay a tax or duty upon an article exported from a State in the form of a direct tax on a bill of lading, evidencing the fact that such article had been exported, and it was held that such a tax was unconstitutional, because it ran counter to the express provision of Article I, section 5, of the Constitution, which says: "No tax or duty shall be laid on articles exported from any State." So far as this prohibition of the Constitution is concerned it made no difference whether the tax laid by Congress was direct or indirect. The language is "no

tax or duty." That language is sufficiently comprehensive to embrace any tax, whether direct or indirect. And while the court said in that decision, "if it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported," that decision did not hold that because a tax on a bill of lading is a tax upon the article exported, that therefore it is a *direct tax* upon such article exported. It made no difference for the purpose of that case whether it was a direct tax or an indirect tax, each was equally obnoxious, and prohibited by the provision of the Constitution, and Congress was powerless to impose any tax or duty direct or indirect of whatsoever character or description upon any article exported from any State.

From this brief review of the cases relied upon by counsel for the plaintiff in error it will be seen that they have absolutely no bearing upon the precise question here under consideration. The case of *Nicol* v. *Ames* (173 U. S., 519) is confidently relied upon by counsel, separate and apart from the other cases, as sustaining his contention that the tax here under discussion is a direct tax. The following excerpt from that decision, and which counsel seems to consider to be decisive of this question, will now be discussed:

> A tax upon the privilege of selling property at the exchange and of thus using the

> facilities there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.*

The words in italics are evidently relied upon by counsel as having an immediate bearing upon the question here under consideration. It may be admitted that the tax upon the privilege of selling property at an exchange differs radically from a tax upon every sale made in any place. That difference was the basis afforded Congress for the classification adopted in the law; and by means of that difference and the classification thus adopted the tax was made to operate uniformly or generally throughout the United States. That is, it was made to apply to the sale of property on boards of trade and exchanges, and of facilities thus afforded in accomplishing such a sale, while at the same time, every sale made in any place was not burdened with such a tax. And the concluding portion of that excerpt, to the effect "that a tax on every sale made in any place is really and practically a tax upon property," is the clause which evidently affords counsel his ground for the contention that it is a direct tax. But if a tax on every sale made in any place is really and practically a tax on property, does not Congress have the power to impose *a tax* on property? And does the language of Mr. Justice Peckham that "a tax upon every sale made in any place" mean that

such a tax is really and practically *a direct* tax upon property? Far from it. The opinion simply says that *it is a tax upon property*. And Congress has the power to impose *a tax upon property*, providing that if it be *a direct tax* it must be *apportioned*, and if an *indirect tax* uniformity alone is sufficient. It will therefore be seen that the decision of *Nicol* v. *Ames*, and the language therein contained, comes very far from holding that because a tax on the sale of property is a tax on the property itself, it is therefore a *direct tax* upon such property.

CONCLUSION.

To briefly summarize the preceding argument and conclusions:

The tax here under discussion, levied upon a sale or an agreement to sell a certificate of stock, is neither *a tax upon an article exported from any State*, nor upon *a means, instrumentality, or agency of a State government*, and is therefore clearly within the power of Congress to enact, subject only to the constitutional rule that if it be a direct tax it must be apportioned, and if it be an indirect tax it must be uniform. It has, we think, been conclusively demonstrated that a tax upon a sale or agreement to sell a certificate of stock is not *a direct tax within any of the classes of direct taxation heretofore adjudged to be such by the decisions of this court*. And in addition thereto it has been most

positively shown, as we think, that the tax imposed is indirect in its character within every definition of that phrase as found in the various opinions of this court.

It is respectfully submitted that the judgment of the circuit court for the southern district of New York should be affirmed.

MILTON D. PURDY,
Assistant Attorney-General.

APPENDIX A.

PROHIBITIONS ON THE TAXING POWER OF THE STATES.

(a) EXPRESS PROHIBITIONS.

1. "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *." (Art. I, sec. 10, par. 2, Constitution.)

Illustrative cases:

Brown v. *Maryland*, *12 Wheat.*, *419*.
Cook v. *Pennsylvania*, *97 U. S.*, *566*.

These cases clearly illustrate the principle of law that when there is entire want of power to tax the forbidden object, that a tax levied upon such object, even though indirectly and remotely affecting such object, that such a tax is unconstitutional and not within the power of the State to impose.

2. "The Congress shall have power: * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, sec. 8, par. 3, Constitution.)

Illustrative cases:

Welton v. *Missouri*, *91 U. S.*, *275*.
Leloup v. *Mobile*, *127 U. S.*, *640*.
Railway Company v. *Jackson*, *7 Wall.*, *262*.
Philadelphia Steamship Company v. *Pennsylvania*, *122 U. S.*, *326*.
Postal Tel. Co. v. *Adams*, *155 U. S.*, *688*.
Robbins v. *Shelby Co. Comrs.*, *120 U. S.*, *489*.
Brown v. *Maryland*, *supra*.
Cook v. *Pennsylvania*, *supra*.

These cases are illustrative of the principle of law that since the Constitution gives Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, that such power is, in its nature, exclusive, and that the States are forbidden absolutely to exercise such power, and that if they impose a tax which seeks to regulate commerce, that such tax will be unconstitutional for the reason that there is an entire want of power on the part of the State to enforce such regulations.

(b) IMPLIED PROHIBITIONS.

1. The various States are prohibited from taxing the means, instrumentalities, and agencies of the General Government.

Illustrative cases:

McCulloch v. *Maryland*, 4 Wheat., 315.
Weston v. *Charleston*, 2 Peters, 449.
Dobbins v. *Erie County Comrs.*, 16 Pet., 435.

APPENDIX B.

VARIOUS DEFINITIONS AND ILLUSTRATIONS OF THE ECONOMICAL AND POLICTICAL MEANING OF THE WORD TAX.

Perhaps one of the best definitions of the word tax that has been given is the definition of Prof. C. F. Bastable, in his work on Public Finance (p. 249):

> A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public power.

In this definition it will be noticed that each word used has a peculiar signification. In the first place, it is compulsory, and while some persons may be willing to give the contribution to the State, nevertheless the law imposing the tax makes it compulsory. In the next place, it is a contribution; that is to say, it involves a sacrifice on the part of the contributor, for every tax necessitates a deduction from the wealth of the contributor, even though compensation may indirectly be brought about by the action. In the next place, it is a contribution from the wealth, and, of course, in this sense, wealth is understood in its very largest and most comprehensive meaning, including services, money, property of all kinds, natures, and descriptions, rights, privileges, etc.; and in the next place, it is imposed on persons. This necessarily follows from the circumstance that the payment of a tax is a duty, and persons

only can be liable to duties. And while the proposition is apparently inconsistent with the division of taxes into personal and real, there is, however, no opposition between the different uses. The term "real taxation" refers to the *object* of taxation; the owner or ultimate bearer is the *subject* of the tax, and he is a person. The remaining phrases, "service" and "public power," require no special consideration.

Prof. David A. Wells's Theory and Practice of Taxation says:

> This word tax, in the English language, and its equivalent in all other languages, is used in a very loose and indefinite sense. Many writers and dictionary makers generally use the word in an extremely generic sense to cover and designate all contributions obtained by process of assessment and levy by a state or government from the persons and property of its citizens, or from persons and property within its jurisdiction, in whatever form, and however arbitrary the assessments or levies may be, and by whatever name they may be known or designated, whether tribute, toll, carriage, duty, gabelle, customs, imports, poll, subsidy, aid, excise, income, or benevolence.

Webster's definition:

> A tax is a rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or state.

Century Dictionary:

> 1. A disagreeable or burdensome duty or charge; an exaction; a requisition; an oppressive demand; strained; burden; task. 2. An enforced proportional contribution levied on persons, property, income, either

(*a*) by the authority of the state for the support of the government, and for all its public or governmental needs, or (*b*) by local authority, for general municipal purposes.

Miller on the Constitution of the United States (p. 235):

> The definition of both Webster and Story is that a tax is a contribution imposed by Government on individuals for the service of the State.

Cooley on taxation (p. 1):

> Taxes are defined as the enforced proportional contributions of persons and property levied by the authority of the State for the support of the Government, and for all public needs.

J. R. McCulloch:

> A tax is a portion, or the value of a portion, of the property or labor of individuals taken from them by Government and placed at its disposal.

Prof. David A. Wells, in his Theory and Practice of Taxation (p. 202), gives the following definition of tax:

> It is that certain portion of the product of a country which must be devoted to the support of the Government.

This definition, Professor Wells states, is deduced from the statement of Mr. Atkinson as to what is the meaning of taxation, which is as follows:

Prof. Edward Atkinson, in his work entitled The Industrial Progress of the Nation:

> Taxation means work of the head, of the hand, or of the machine, or all combined, and the method of taxation is only a method of dissipating the products of work. It is

measured here in the process of distribution in terms of money, but the money itself stands for work and is derived from work, and the work of the Government is as much a part of the work of the community as any other. All who work, from the head of the nation down to the lowest municipal official, must be supplied with shelter, food, and clothing, and this is met by the taxes doing the work that is necessary to furnish this supply.

For a very full discussion of the definitions, object, and sphere of taxation, see Theory and Practice of Taxation, David A. Wells, chapter 9.

THE POPULAR THEORY OF TAXATION IN THE UNITED STATES, STATED AND EXAMINED.

The general idea which constitutes the basis of the system of State or local taxation, mainly recognized in the United States (though not in other countries) and generally known and designated as "the general property tax," is founded on the assumption that in order to tax equitably it is necessary to tax everything; the term everything being at the same time used in a sense so indefinite as to embrace not merely things in the nature of physical actualities other than persons, but also persons, incomes, rights, representatives of property, titles, trusts, conclusions of law, debts, and, in short, any act of assessing capable of resulting in the obtaining of revenue. As a logical consequence of this idea, the exemption of anything from taxation is furthermore held to be not only impolitic but unjust, and if made necessary by circumstances, as something to be regretted. (David A. Wells, Theory and Practice of Taxation, p. 392.)

It seems that it was this popular theory of taxation which was under consideration in the income-tax cases; that is, that the law of Congress, under discussion in those cases, had application to a general property tax, and that it made no difference whether it related to a general real property tax or a general personal property tax, or the incomes derived therefrom.; that in any and all such cases it would amount to direct taxation.

> The general property tax for general State purposes exists in all but four of the States of the Federal Union—Delaware, New Jersey, Pennsylvania, and Wisconsin. In Delaware there had been no property tax since 1877, as its expenses are defrayed mainly by licenses and taxes on railroads. In New Jersey there is only a school tax on property, but no property tax for general State purposes. In Pennsylvania the State tax is levied only on personal property. In Wisconsin the so-called State tax is levied only to defray the interest of the debt and for the purpose of contributing to the university, schools, and expenditures on account of the insane, but there is no property tax for general purposes. In addition to these four cases, a property tax is levied in Vermont only in case the public tax does not suffice to pay the entire expenses of the State. (David A. Wells, Theory and Practice of Taxation, p. 393.)

APPENDIX C.

DEFINITIONS OF THE TERMS DUTIES, IMPOSTS, AND EXCISES.

(a) Duties:

The Century Dictionary defines duty as follows:

> A tax or impost; excise or customs dues; the sum of money levied by a government upon certain articles, specifically on articles imported or exported: as, the stamp duty of Great Britain; the legacy duty; the duties on sugar; ad valorem and specific duties.

Andrews, in his work on Revenue Laws, section 133, says:

> The word duties is often used as synonymous with taxes, but is more often used as equivalent to customs; the latter being taxes involved upon goods and merchandise which are exported or imported. In this sense duties are equivalent to imposts, although the latter word is often restrained to duties on goods and merchandise which are imported from abroad.

The American and English Encyclopædia of Law, second edition, vol. 10, page 351:

> Duty means a tax, toll, impost, or custom.

In the case of *Pacific Insurance Company* v. *Soule* (7 Wall., 445), duties are defined as follows:

> Duties are defined to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than taxes. It is applied, in its most restricted meaning, to customs, and in that sense is nearly the synonym of imposts.

In *State* v. *Orleans Navigation Company* (11 Martin (La.), 153), it is said:

> A duty is a tax or impost raised by a State for the use of its government. A toll, on the contrary, signifies a payment in towns, markets, and fairs for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within the same.

(b) Imposts:

Professor Wells defines imposts as follows:

> The term impost is a general expression for any tax, duty, or tribute, but is seldom now applied to any but indirect taxes on imports.

Origin of the terms imposts and duties.

> The origin of all these terms is obscure and involves some interesting features in English history. It appears certain that they were in the first instance applied to exactions on trade generally and not, as was finally the case, on imports and exports exclusively, and were in use before indirect taxes on personal property were recognized in England. At the outset and for a long period they were also not regarded in the light of taxes, but rather as dues personal to the sovereign, which he had the right to regulate and collect independent of any statute and which carried with it the further right to restrain at pleasure the import or export of any commodity. Thus, until the reign of Edward II (1272–1307) the right to tax the export of the wool was exclusively a royal privilege; and the enactment of a statute by Parliament in 1275, limiting the amount that the King could take in respect

> to the export of wool, skins, and leather—but not denying the privilege—*is regarded as the first legal foundation* in England of the customs revenue. The controversy between the King and Parliament over customs duties went on, however, with varying phases until finally settled in 1682; and from these circumstances, and also from the fact that customs and duties are unseen by those who finally bear their burden because they are embodied in the prices of commodities, has possibly come about the curious idea that tariffs, or taxes on imports, are not taxes on any one or are any burden on property, but rather some sort of a business contrivance for the raising of revenue, and, if they are taxes at all, then that the foreigner pays them. (Professor Wells's Theory and Practice of Taxation, p. 379.)

Professor Bastable, in his work on Public Finance (p. 512), says:

> The taxation of goods at the frontier or on passing a fixed boundary line—what is known in England as the customs revenue—is far older than the system of internal duties. Almost from the origin of commerce we can find traces of its development and can note its gradual development into an important source of state income. Nor has it as yet lost much of its prominence. Notwithstanding the great increase of other branches of taxation, customs are still a conspicuous part of nearly every national budget, and in some countries are regarded as the only convenient mode of levying dues on consumption.

But however vague or uncertain the original and historical meaning of the terms "duties" and "imposts" may be, and whatever may have been the precise meaning of these terms at the time that

the Constitution was adopted, there is little room for doubt that at that time, and since that time, the terms had become considerably enlarged in their meaning and application to the taxes which they were intended to designate. But notwithstanding the extensive application of those terms at the time of the adoption of the Constitution, it is universally admitted that as used in the Constitution they had reference to only such taxes as were indirect in their essential characteristics, and were so regarded by political economists of that day, and by the framers of the Constitution and the judicial decisions wherein these terms have received consideration. They are, therefore, of little moment in the discussion of the case here under consideration, for the tax here imposed, while it may be included in the word "duty" in the more enlarged definition of that term, is essentially and necessarily an excise tax, and since the term "excise" is specifically referred to in the Constitution, it makes little difference whether or not it is also properly regarded as a duty.

(c) Excise:

Professor Wells, in his work above referred to (p. 380), has the following to say with reference to the origin and meaning of this term:

> The term excise, though used in the Constitution of the United States, is now almost entirely restricted in use to the tax system of Great Britain, and even there has acquired a far different meaning and application from what it possessed originally. Thus the term was first applied in England to taxes on manufactured commodities produced and consumed in the kingdom, as beer, cider, soap, glass, paper, and the like, and

in contradistinction to duties or customs on commodities of foreign manufacture and importation; and this distinction is still officially recognized in the fact that special care has always been taken in all British legislation on this subject to make the excise tax as nearly equal as possible to the customs imposed on the same kind of imported commodities. The term is supposed to find its origin also in the circumstance that it was originally the practice to cut off, or "excise," portions of the goods assessed, and take them away in payment of the tax in kind. The first attempt to impose an excise tax in England was in 1525, and failed, as both houses of Parliament concurred in opinion that it was unconstitutional. After the restoration, or under Charles II, the attempt was successfully renewed, and the taxes under it were very curiously divided into two classes, and the receipts from the same made personal to the Crown—namely, the hereditary excise, so called because granted to the Crown forever in consideration or recompense for the abandonment by the Crown of certain perquisites and privileges, and the temporary excise, the receipts of which were only granted to the sovereign for life. The tax was, however, always unpopular in England, being regarded as contrary to the spirit and principles of a just government, and on the accession of William and Mary it was greatly modified and reduced; and it is somewhat curious that a term having such an origin and history should have found a place in the Federal Constitution and be thus recognized as a legitimate form of taxation under a free government. In Great Britain at the present time the only commodities on which taxes designated as excise are assessed are

spirits, malt, fermented liquors, and chicory or other substitutes for coffee. But, in addition, the British system classifies, under the head of excise, its taxes on railways and a few other minor subjects.

Justice Miller's definition of excise:

> The late United States Justice Miller defined an excise tax as one which is assessed upon some article of property or money, or something which is exhausted in the use. This one, from its nature, must be paid by the bearer or last man who buys or uses the property, because whoever has it at the time when the tax is levied upon it adds that amount to the selling price when he comes to dispose of it until the property is sold. It is a tax on consumption.

Mr. Justice Field, in his concurring opinion upon the income-tax cases (157 U. S., 592), defines excise as follows:

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

> Cooley (on Taxation, p. 3) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation, or consumption of goods;" having "a broader meaning than custom, which is a duty imposed on imports or exports;" that "the term impost also signifies any tax,

> tribute, or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

> Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

The Century Dictionary defines the word "excise" as follows:

> An inland tax or duty imposed on certain commodities of home production and consumption, as spirits, tobacco, etc., or on their manufacture and sale.
>
> In Great Britain the licenses to pursue certain callings, to keep dogs, to carry a gun, and to deal in certain commodities, are included in the excise duties, as well as the taxes on armorial bearings, carriages, servants, plate, railways, etc. Excise duties were first imposed by the Long Parliament in 1643.

Blackwell, in his work on Tax Titles, fourth edition, says:

> An excise is based on no rule of apportionment or equality whatever, but is a fixed, absolute, and direct charge laid on merchandise, products, or commodities,

> without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is paid.

While originally the term "excise" may have been confined in its application to a tax upon articles which were exhausted in the consumption, it is evident that the definition of that term was gradually enlarged in the course of legislative and judicial construction, until at the time of the Pollock case it not only embraced and included a tax upon articles which were exhausted in their consumption, but included certain rights, privileges, or licenses of the individual citizen with respect to his property.

Nicol v. *Ames* (173 U. S., 509).

In this case the court held that a tax authorized by the act of June 13, 1898, upon the sale of property made on a board of trade or exchange is not a direct tax, nor a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, separate and apart from the business itself, and the court said:

> At present it is enough to say that the tax is not upon the property sold, and can not on that ground be found to be direct. The tax laid in the same act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker; while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon

> the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an *excise*.

From this decision it appears that the term "excise" was still further enlarged in its meaning so as to cover a tax upon a privilege or facility used in effecting a sale by means of a stock exchange.

APPENDIX D.

VARIOUS DEFINITIONS OF THE TERMS "DIRECT" AND "INDIRECT" TAXES.

(1) *Definition of Mr. Edmunds* (157 U. S., 491):

> But my definition is—and I believe it to be generally found to be universally true—that a direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods which he may import or not import as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.

(2) *Mr. Justice Brown* (157 U. S., 491) said:

> Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

(3) *Definition of Mr. Chief Justice Fuller* (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some

one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized.

(4) *Definition of Mr. Sedgwick* (157 U. S., 568):

In the debates in the House of Representatives preceding the passage of the act of Congress to lay "duties upon carriages for the conveyance of persons," approved June 5, 1794 (1 Stats., 373, c. 45), Mr. Sedgwick said that "a capitation tax and taxes on land and on property and income generally were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly if objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax within the meaning of the Constitution."

(5) *Definition of Albert Gallatin* (157 U. S., 569):

The most generally received opinion, however, is that by direct taxes in the Constitution those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and

as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed. (He then quotes from Smith's Wealth of Nations, and continues): The remarkable coincidence of the clause of the Constitution with this passage in using the word "capitation" as a generic expression, including the different species of direct taxes, an acceptation of the word, peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by *direct* taxes, meant those paid *directly* from and falling *immediately* on the revenue; and by *indirect*, those which are paid *indirectly* out of the revenue by falling immediately upon the expense. (3 Gallatin's Writings (Adams's ed.), 74, 75.)

(6) *Definition by Mr. Justice Chase, Mr. Justice Iredell, and Mr. Justice Paterson, in the Hylton case:*

Mr. Justice CHASE. I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit: A capitation or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States, is included within the term direct tax.

Mr. Justice PATERSON: The Constitution declares that a capitation tax is a direct tax, and both in theory and practice a

tax on land is deemed to be a direct tax. * * * It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land in its original and crude state ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land independently of its produce is of no value. * * * Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax, and taxes on land is a questionable point. * * * All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax.

Mr. Justice IREDELL: There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil—something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * In regard to other articles, there may possibly be considerable doubt. It is sufficient on the present occasion for the court to be satisfied that this is not a direct tax contemplated by the Constitution in order to affirm the present judgment, since if it can not be apportioned, it must necessarily be uniform.

(7) *Hamilton's definition* (157 U. S., 572):

The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of

individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes.

(8) *Definition of Mr. Chief Justice Chase in Veazie Bank* v. *Fenno* (8 Wall., 546):

> It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.
>
> It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity.

(9) *Definition of Judge Cooley, in his work on Constitutional Limitations* (595, fifth edition, marginal paying *480):

> Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population. The term "direct taxes," as employed in the Constitution, has a technical meaning, and embraces capitation and land taxes only.

(10) *Miller on the Constitution, 237, thus puts it:*

> Under the provisions already quoted the question came up as to what is a "direct tax," and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land

tax is a direct tax within the meaning of the Constitution of the United States. All other taxes, except imposts, are properly called excise taxes. Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.

(11) *In Pomeroy's Constitutional Law* (§ 281) *the definition is as follows:*

It becomes necessary, therefore, to inquire a little more particularly, What are direct and what indirect taxes? Few cases on the general question of taxation have arisen and been decided by the Supreme Court for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal-revenue acts now in operation are indirect.

This subject came before the Supreme Court of the United States in a very early case, *Hylton* v. *United States*. In the year 1794 Congress laid a tax of $10 on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct and should have been apportioned among the States. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal-revenue laws.

(12) *Hare on American Constitutional Law* (vol. 1, pp. 249, 250), says:

Agreeably to section 9 of Article I, paragraph 4, "no capitation or other direct tax shall be laid except in proportion to the

census or enumeration hereinbefore directed to be taken;" while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several States * * * according to their respective numbers. Direct taxes in the sense of the Constitution are poll taxes and taxes on land.

(13) *Burroughs on Taxation* (p. 502):

Direct taxes.—The kinds of taxation authorized are both direct and indirect. The construction given to the expression "direct taxes," is that it includes only a tax on land and a poll tax, and this is in accord with the views of writers upon political economy.

(14) For the definition of Ordronaux, in his Constitutional Legislation (p. 225), see 157 U. S., 624.

(15) *Black on the Constitution* (p. 162), says:

But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity, which he must pay. But the course of judicial decision has determined that the term "direct," as here applied to taxes, is to be taken in a more restricted sense. The Supreme Court has ruled that only land taxes and capitation taxes are "direct," and no others. In 1794 Congress levied a tax of $10 on all carriages

kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of State banks, nor a succession tax, imposed upon every "devolution of title to real estate."

(16) *Definition by Mr. Justice Swayne in Springer v. United States* (102 U. S., 602):

> Our conclusions are that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.

(17) Prof. C. F. Bastable, professor of political economy in the University of Dublin, in a recent work on Public Finance (p. 249), gives the following definition of a tax:

> A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public powers.

And in the same work, on page 256, he states:

> One of the most widely known and frequently used divisions of taxation is that into "direct" and "indirect;" unfortunately it is used in different senses, though with several points of connection. That most familiar to English readers is stated by J. S. Mill in the following terms:
>
> "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (Principles, bk. 5, chap. 3, sec. 1.)

And Professor Bastable, in commenting on this definition, says that "whatever be its economical importance, it is evidently useless for administrative purposes, and probably owes its origin to the peculiar theory of the Physiocrats respecting the source of taxation. A natural result has been that practical financiers have adopted a different basis of distinction, and regard those taxes as direct which are levied on permanent and recurring occasions; while charges on occasional and particular events are placed under the category of indirect taxation. On either method the income tax would be direct, and the excise and customs indirect; the death duties would be direct from Mill's point of view, and indirect in the administrative sense."

(18) David A. Wells, in his work on the Theory and Practice of Taxation, has the following to say with reference to direct and indirect taxes:

> Taxes are generally characterized or classified as being either direct or indirect; but these terms, although in common use, are somewhat indefinite, owing to the inability of economists to agree as to their exact meaning; while in the United States this indefiniteness has been increased by the circumstance that its Supreme Federal Court has felt compelled by the language of the Federal Constitution to assign to the term "direct," as applicable to taxation, a "legal" rather than economic definition.
>
> In a general sense the term direct is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them; and indirect to those which are demanded from a person with the expectation and intention that he shall indemnify himself for payment

of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense ultimately) by the consumer of the taxed article. On the other hand, a direct tax has always in it an element of compulsion; not necessarily on the person who advances the tax in block, but on the person who is compelled to use or consume the taxed property or its product. For example, there is nothing compulsory or unequal in an ordinary license tax. If the license is high, no one is compelled to engage in a business covered by its legal requirements; and few persons will until the average profits of the taxed business by the regular laws of competition finally reach the average profits of other like employments or investments. A tax on commodities like whisky, tobacco, fermented liquors, oleomargarine, playing cards, dice, and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon all real or personal property, or on the income of such property. Human beings can not subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes.

The presence or absence of the principle of compulsion as constituting the essential difference between a direct and an indirect tax has not, it is believed, been before generally recognized by economists. And yet it is clearly involved or comprised in the definitions given by acknowledged authorities on the subject. Thus M. Leroy-Beaulieu, in his Traité de la Science des Finances, characterizes those taxes "as direct which the legislator intends should be paid at once and immediately by him who bears their burden. They strike at once his fortune or his revenue, and every intermediary between him and the treasury is suppressed." McCulloch (Principles of Taxation) describes a tax "to be direct when it is immediatety taken from property," and indirect "when it is taken from its owners by making them pay for liberty to use certain articles or exercise certain privileges." M. Say defines a direct tax to be the "absolute demand of a specific portion of an individual's real or supposed revenue." (Political Economy, p. 461.)

O